IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 21, 2007

ASATA LOWE v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Blount County
No. C-14586 D. Kelly Thomas, Jr., Judge

No. E2006-02028-CCA-MR3-PC - Filed March 10, 2008

A Blount County jury convicted the Petitioner, Asata Lowe, of two counts of first degree murder and one count of especially aggravated robbery, and he was sentenced to two concurrent life sentences without the possibility of parole. This Court affirmed his convictions and sentences on appeal. The Petitioner filed a petition for post-conviction relief claiming he was entitled to relief because he discovered new exculpatory evidence, the State failed to secure and disclose evidence favorable to him, and he did not receive the effective assistance of counsel. The post-conviction court denied the petition for relief. On appeal, the Petitioner raises the same claims, and, additionally, he asserts that the post-conviction court erred in refusing to allow him to redraft an amended petition in accordance with *Holton v. State*, 201 S.W.3d 626 (Tenn. 2006), and in failing to appoint expert witnesses during the post-conviction proceedings. The Petitioner also asserts that the cumulative effect of these errors, along with the harmless errors found in this Court's opinion on direct appeal, constitute a deprivation of due process. After a thorough review of the record of proceedings, including the direct appeal, we conclude the post-conviction court did not err in denying the petition for post-conviction relief. We, therefore, affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

James H. Snyder, Jr., Alcoa, Tennessee, for the Appellant, Asata Lowe.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; Michael L. Flynn, District Attorney General; Rocky Young, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

In this Court's opinion on direct appeal, we described the procedural history as follows:

> The Defendant, Asata D. Lowe, was charged in indictment number 11329 with the following crimes against Charles Hill: first degree premeditated murder, felony murder in the perpetration of a robbery, especially aggravated robbery, theft of property valued over $1,000, and felony murder in the perpetration of theft. A Blount County jury found the Defendant guilty of the following offenses against Charles Hill: first degree premeditated murder, felony murder in the perpetration of a robbery, and felony murder in the perpetration of a theft. At the close of the State's proof, the trial court dismissed the charges of robbery and theft. The trial court merged the two felony murder convictions into the first degree premeditated murder conviction.
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> In indictment number 11330, the Defendant was charged with the following crimes against Sammy Garner: first degree premeditated murder, felony murder in the perpetration of a robbery, especially aggravated robbery, theft of property valued over $1,000, and felony murder in the perpetration of theft. A Blount County jury convicted the Defendant of all charges in the second indictment. The trial court merged the two felony murder convictions into the first degree premeditated murder conviction and it also merged the theft conviction into the especially aggravated robbery conviction.

State v. Asata Lowe, No. E2000-015910CCA-R3-CD, 2002 WL 31051631, at *1 (Tenn. Crim. App., at Knoxville, Sept. 16, 2002), *perm. app. denied* (Tenn. Feb. 3, 2003).

We further explained the facts[1] of the case as follows:

A. State's Proof

> Officer Robert Hubbard, a member of the Drug Task Force of the Blount County Sheriff's Department, testified that on October 16, 1998, he was at Shaggy's Market, a convenience store on Aluminum Avenue in Alcoa, Tennessee. According to Hubbard, late that afternoon the door to the store "opened and a young man fell through the door." Hubbard testified that the man was "bleeding from . . . his sides." Hubbard immediately dialed 911 and, at the same time, walked over to the victim and "did chest compressions" to keep him breathing. Hubbard testified that the victim was still alive when the ambulance arrived, but he appeared to be dying. Hubbard recognized the victim as Charles "Bill" Hill and stated that the victim "frequented"

[1] We include the entire, rather lengthy, description of the facts because the post-conviction court based its decision on the weight of the evidence presented during the Petitioner's trial.

Shaggy's Market. Hubbard testified that Stacey's Place, also known as Stac[e]y's Bar and Grill, was separated from Shaggy's Market by two dumpsters. Hubbard stated that Stacey's Place was not operated as a full-time business; however, parties were often held there.

Larry Sankey testified that at around 5:15 or 5:30 p.m. on October 16, 1998, he stopped at Shaggy's Market to buy a Coke, and as he started to walk out the door, he heard gunshots. Sankey recalled that approximately ten seconds later, he saw a man running towards him. According to Sankey, just as the man "got to the drive . . . it was just like he hit a brick wall . . . his hands went up." Sankey could tell that the man had been shot because "the blood just spurted . . . out his side."

Sankey testified that the man fell when he reached the side of Sankey's car in the parking lot, and less than a minute later, Sankey heard a car pulling out of the driveway to Stacey's Place. Sankey described the car as an "older, large" Oldsmobile or Pontiac, which was dark red or wine- colored. Sankey testified that he was sitting in his car when the wine-colored car pulled away from Stacey's Place. Sankey stated that his window was down and that the front windows of the wine-colored car were also rolled down. Sankey testified that he was able to see two individuals in the vehicle and he described them both as African-American males. Sankey stated that the driver had a dark complexion and that the passenger was "light-skinned." Sankey thought that the driver appeared to be shorter than the passenger. Sankey was unable to positively identify the Defendant in court as one of the men in the car.

According to Sankey, the car traveled down Aluminum Avenue, "[g]ot to the stop, took a left, went up to Hall Road and took a right." Sankey testified that the route that the vehicle took leads to Alcoa Highway. Sankey stated that he "went up the street[,] . . . looked both ways, turned, came back[,] . . . went to where the victim was . . . and waited on the police officers." Sankey testified that he did not see anyone else at Stacey's Place. When police officers arrived, Sankey gave them a description of the vehicle and the route that it had taken. Sankey stated that the car was moving "fast" when it pulled out of Stacey's Place.

Kevin Condee, a deputy sheriff with the Blount County Sheriff's Department, testified that on October 16, 1998, he was working as a patrol officer when he responded to a report that a major crime had occurred on Aluminum Avenue. Condee first went to Shaggy's Market, where he "saw a black male subject slumped over in the doorway of the business, with some other people around him." Condee testified that the man was "bleeding severely from the front part of his body. There was just a lot of blood." Condee stated that the man appeared to be "struggling . . . to breathe," but Condee could not tell if the man was conscious. Condee recognized the man as Charles "Bill" Hill.

Condee then spoke with Larry Sankey, who gave him information regarding a car containing passengers which had left the area of the crime. Condee immediately transmitted this information on the radio to other officers. Condee described the car as a "maroon or wine-colored Buick, four-door-type car," and he announced that the car was traveling on Hall Road towards the bypass area.

Condee testified that there was blood outside Shaggy's Market and that there was a "blood trail" between Shaggy's Market and Stacey's Place. Condee testified that a red car was parked in the garage behind Stacey's Place. Condee recalled that a telephone was laying on the ground near Stacey's Place.

Rodney Lovin, a deputy sheriff with the Blount County Sheriff's Department, testified that on October 16, 1998, he was employed as a patrolman with the Alcoa Police Department. Lovin testified that at approximately 5:45 p.m., he received a dispatch reporting a major crime on Aluminum Avenue in Alcoa. When Lovin arrived at the scene, Officer Condee was already there. At the scene, Lovin observed "a black male bent over in the doorway of Shaggy's Market. He was bent over on his knees. He was bleeding very badly from the front side of his body . . . ." Lovin tried to speak to the victim; however, the victim did not respond. Lovin identified the victim as Charles Hill.

Lovin then located a trail of blood which led to Stacey's Place. The trail "went up to the left side of the parking lot, all the way back to underneath a carport area where a back door is." Lovin followed the blood trail and found in the carport a red vehicle with the motor still running. Lovin testified that he was also made aware of a telephone laying near the crime scene. Once Lovin entered Stacey's Place, he observed a male lying on his left side behind the bar with his hand underneath him and "what appeared to be an automatic weapon just a few inches from his body." Unsure if the person was alive, the officers told the person not to move. Upon further investigation, Lovin noticed what appeared to be a bullet wound near the person's jaw. After another officer moved the gun away from the person, Lovin lifted the person's arm and was not able to feel a pulse. Officers then radioed for another ambulance. The second victim was later identified as Sammy Garner.

Deputy Sheriff James L. Wilson of the Blount County Sheriff's Department testified that on October 16, 1998, he was a senior police officer with the Maryville Police Department and that he received a dispatch about a shooting on Aluminum Avenue. He and two other officers went to the crime scene to assist the Alcoa Police Department. Wilson first went to Shaggy's Market, where he recognized Charles Hill in the doorway. Wilson testified that Hill was in distress; according to Wilson, Hill was on his knees "bleeding profusely." Wilson heard Hill "gurgling, attempting to breathe." Wilson stated that Hill appeared to have gunshot wounds to the front portion of his body.

Wilson then followed a trail of blood to Stacey's Place. Wilson testified that he and Sergeant Brooks went inside Stacey's Place. Wilson observed a bullet hole in the glass portion of the doorway leading to the carport. Wilson testified that Brooks noticed a person and a gun. Unsure if the person was alive, Brooks called for assistance. The weapon was removed and secured. Wilson then testified that one officer checked the victim and found no signs of life. Wilson testified that the gun laying next to the victim was a semi-automatic Glock pistol. Wilson also testified that a bullet was laying next to the gun. Wilson later saw a telephone laying on the ground. Wilson testified that the phone was "directly out from the entrance of Stacey's, l[a]ying in the middle of the road."

Sergeant Steve Brooks of the Alcoa Police Department was also called to the crime scene on Aluminum Avenue. Brooks testified that he entered Stacey's Place through the carport. Brooks recalled that the room he entered was very dark. Brooks looked behind the bar, saw a pair of feet wearing work boots, and warned the other officers. Brooks testified that he then got on top of the bar because he was not sure if the victim was dead. Brooks recognized the victim as Sammy Garner. Brooks then checked the victim for signs of life and called an ambulance. Brooks also observed a gun that was in a "locked and loaded position" and a bullet beside the victim.

Captain Lowell H. Ridings, Jr., testified that he is in charge of the Criminal Investigations Division of the Alcoa Police Department. On the day of the offense, Ridings went to Stacey's Place to perform a "sweep" and to search for evidence of a crime. Ridings stated that the scene "[k]ind of looked like chaos," and he surmised that there had been a shooting. According to Ridings, Garner's body was behind the counter. Near Garner's body, Ridings found a .40-caliber Glock pistol containing a magazine and "nothing in the breech." Ridings also observed a .40-caliber unfired shell laying against the edge of the counter. Ridings examined the gun and determined that it had not been recently fired.

Ridings also found five ejected, fired .45-caliber shells. Three of the shells were located near the door, one was near the corner of the bar, and one was behind the bar. Ridings stated that there were indications that a bullet had penetrated the door; however, officers were unable to find a bullet at that location. Ridings observed on the counter "about a double bread pan full of aluminum foil . . . which contained a white powder substance." Near the powdery substance, Ridings found a set of digital scales which he stated are used to weigh small objects in grams.

Derrick Swenson, a patrol officer with the Alcoa Police Department, testified that on October 16, 1998, he was called upon to assist Captain Ridings in investigating the crime scene at Stacey's Place. Swenson testified that "on the counter top" inside the bar he observed one open container of cocaine in aluminum foil. Also on the bar was a zip-lock bag containing a powdery substance. Inside a

vending machine, officers found "several baggies of what appeared to be . . . a large quantity of crack cocaine." Nine "baggies" of powder cocaine were found in the bottom of the vending machine.

Ernest Kemper, III, a patrol officer with the Alcoa Police Department, testified that on October 16, 1998, he was working as a uniformed police presence at the Clayton Homes Show located on Alcoa Highway. Kemper was in a marked police vehicle. According to Kemper, around 5:30 or 5:45 p.m., he received an emergency dispatch that there had been a shooting on Aluminum Avenue. The dispatch informed officers that the suspect vehicle was a maroon car occupied by two black males. Kemper testified that within a minute of the dispatch, he observed a vehicle matching that description pass by him on Alcoa Highway. Kemper stated that the driver of the vehicle had darker skin than the passenger. Kemper got into his patrol car, pulled behind the vehicle, and called in the license plate to the police department. Kemper was informed that the tag on the car was not on file. Kemper testified that he then activated his lights and siren and tried to initiate a traffic stop. However, the maroon car continued to accelerate. Kemper testified that the suspect vehicle was traveling at a rate of speed that was at least seventy miles per hour.

Kemper recalled that as his car and the vehicle driven by the suspects neared the Blount and Knox County line, he was not able to receive radio transmissions. The suspect vehicle turned onto Woodson Drive in Knox County. Kemper testified that the vehicle slowed, and the driver's door opened. Kemper drove alongside the vehicle so that the suspects could not flee. Kemper testified that when the cars were right beside each other, the passenger appeared to have a firearm pointed at Kemper. At this point, the suspect vehicle had almost stopped, and Kemper stated that in order to prevent the passenger from shooting, Kemper fired at least one round from his service pistol.

Kemper testified that he then tried to force the suspect vehicle off the road by hitting the rear of the suspect vehicle. The suspect vehicle went through an intersection and was struck by a southbound station wagon. Kemper testified that he believed that his car hit the suspect vehicle again after the first collision. Kemper recalled that the driver exited the vehicle through the rear passenger door and "made a movement with his hands into his waistline." Kemper testified that he told the driver to put his hands in the air, but the driver did not comply. Kemper stated that the driver then made a "sudden movement from his waist towards [Kemper]," so Kemper shot at the driver. The driver fell to the ground. Kemper testified that the passenger tried to get out of the car, but Kemper sprayed him with a chemical spray in order to subdue him. Kemper did not see any weapons on either suspect. More officers soon arrived, and the suspects were transported to a hospital.

At trial, Kemper identified the Defendant as the driver of the suspect vehicle. Kemper testified that he believed that the Defendant was wearing "a pair of camoflauge britches . . . and a red shirt and a bullet proof vest under his red shirt." Kemper identified the passenger of the suspect vehicle as Brian Whitman. Kemper admitted that during the chase, the men could have thrown a weapon from their car without him noticing.

David Gilliam, M.D., the Blount County Medical Examiner, performed autopsies on both victims in this case. Gilliam testified that Garner suffered a gunshot wound to the top of his head and a gunshot near the right corner of his mouth. Gilliam determined that neither of the wounds were "contact wounds."

Gilliam testified that Hill suffered a gunshot to his right back, which penetrated his right lung and hit his heart. Gilliam reported that Hill also suffered a gunshot wound to his left back. Gilliam stated that Hill died of massive blood loss. Gilliam also noted that Hill was probably moving when he was shot.

Greg McCallie testified that on the afternoon of October 16, 1998, he was in Howe Street Park in the Hall-Oalfield community in Alcoa with Charles Hill and Sammy Garner, Jr. McCallie testified that Garner owned an establishment called Stacey's Place and that Garner lived in an apartment above the shop. According to McCallie, Garner kept cocaine in the ceiling of the kitchen and a gun underneath the counter behind the bar. McCallie stated that sometime before sundown on October 16, 1998, Garner asked McCallie to transport him to Garner's bar on Aluminum Avenue because he was having car trouble. McCallie told Garner that he could not go because he had his nephews in the park with him. At that time, Hill offered to take Garner to his bar.

Myron Lea Kellogg testified that on October 16, 1998, Garner also asked him for a ride. Kellogg stated that Garner needed his help to make a drug deal. Kellogg testified that Garner told him that he had cocaine. Kellogg further testified that on or about October 14, 1998, he went with Garner to Atlanta, Georgia, where Garner purchased a kilogram (thirty-six ounces) of cocaine for $27,000. According to Kellogg, when Garner returned to Stacey's Place, he placed the cocaine in the ceiling of the kitchen. Kellogg recalled that Garner kept a .40-caliber gun behind the bar at Stacey's Place. Kellogg testified that he had witnessed "about a thousand" drug deals, and he had never seen anyone wear a flak jacket or a bullet-proof vest to the transactions.

Seneca Toure Teeter was also in Howe Street Park in Alcoa on October 16, 1998. Teeter testified that while in the park, Garner borrowed his cell phone to make a call. Teeter stated that Garner stayed on the phone for approximately ten minutes, but Teeter was not able to hear the conversation. According to Teeter, just before

leaving, Garner stated that he was "about to go make a sale and he would be back in a little bit."

Brian Whitman testified that on October 16, 1998, the Defendant asked Whitman to ride with him to Alcoa. Whitman stated that he decided to go with the Defendant because he wanted to see Sammy Garner. According to Whitman, the Defendant was wearing a bullet-proof vest when they left to go to Alcoa. Whitman stated that he had never seen the vest before. Whitman testified that the Defendant was driving Jamal Tory's "burgundy 98" Oldsmobile. Whitman recalled that when they arrived at Garner's club, nobody was there. After a few minutes, a small red car pulled up to the club. Whitman stated that Hill was driving and Garner was in the passenger seat. Whitman testified that he knew Garner but that he did not know Hill.

Whitman testified that both cars parked in the carport. According to Whitman, everyone got out of the cars except Hill, who "came in maybe a minute after [everyone else] came in." Whitman recalled that he talked to Garner and that everyone was friendly. Whitman stated that the Defendant and Garner began to talk, but he recalled that the Defendant and Hill did not even look at each other. Whitman testified that once everyone was inside, he asked to use the phone, and he took the phone outside to make a call. Whitman testified, "By the time I got outside to use the phone, I heard four gunshots." Whitman stated that he "threw [the phone] down and ducked out of the way when [he] saw Mr. Hill run out the door." According to Whitman, Hill ran down the street towards the convenience store. Whitman then saw the Defendant run out of the building with something that looked "[l]ike a little plastic Kroger bag." Whitman testified that the Defendant got into the driver's side of the vehicle and Whitman got in on the passenger's side. Whitman stated that the Defendant threw the bag in Whitman's lap and said that "they tried to kill him."

Whitman testified that the Defendant left Stacey's Place, driving "fast" past Shaggy's Market towards the highway. Whitman stated that he looked in the bag and saw that it was "full of dope." Whitman threw the bag onto the back seat and then he climbed onto the backseat. Whitman testified that he stuffed the bag into the backseat, "[b]ehind the armrest." Whitman climbed back onto the front seat and saw a gun laying beside the Defendant. Whitman then saw a police officer on the side of the road get into his patrol car and warned the Defendant. According to Whitman, the Defendant said that he could not pull over "[b]ecause that's how [he] got caught the last time." Whitman estimated that it took the police officer approximately two minutes to catch up to their vehicle and turn on his lights and siren. Whitman stated that he last saw the gun right before the police officer pulled behind their car. Whitman testified, "And then after he was behind us for so long, [the Defendant] attempted . . . . to pull over or confuse the police officer or lose him or whatever." The Defendant then turned onto a side street. Whitman stated that by the time the

Defendant turned, "the policeman had shot at [them]. He let two rounds off at [them]."

Whitman testified that at some point, the police car "rammed into the back of" their car, which "pushed [them] through the intersection." Whitman stated that their car "fishtailed" and was hit by another car. According to Whitman, the Defendant began climbing out of the driver's side door and ran around to the back of the vehicle, at which time the officer, who was also out of his car, "let off two more shots." The Defendant then laid down on the ground. Whitman testified that he remained in the car, and the police officer sprayed him in the face with "mace, pepper spray or whatever it was" so he "couldn't see anything." Officers pulled Whitman out of the car and he laid on the ground. Whitman recalled that his left knee was cut during the incident.

Whitman testified that the Defendant told him that he was going to Alcoa to buy cocaine. Whitman maintained that he did not want to be involved in a drug transaction, but that he just rode with the Defendant so he could see Garner. Whitman testified that he deliberately did not pay attention to the conversation in the club. Whitman testified that the Defendant owned a .45-caliber pistol with a "pointer" or laser sight on it. Whitman identified the gun recovered from the highway median as the Defendant's gun. Whitman testified that the Defendant always carried that gun, and Whitman just assumed that the Defendant had it with him when they went to Alcoa.

Charles "Chuck" Lassetter, an officer with the Knox County Sheriff's Department, testified that the police department towed the suspect vehicle to the City County Building, where it was turned over to detectives. According to Lassetter, the car was registered to Jamal Tory.

Brad Park, a crime scene technician with the Knox County Sheriff's Office, performed the final search of the suspect vehicle. Park testified that he also fingerprinted the vehicle and took photographs of the vehicle. Park testified that during his search, he found a bullet in the vehicle frame. Park also testified that he found a white plastic shopping bag "underneath the armrest between the insulation and the frame of the trunk." Park believed that someone would have to make an effort to put the bag where it was found. Inside the shopping bag, Park found four separate ziplock bags containing a white powdery substance. Park testified that no prints were found on the bags; however, Brian Whitman's fingerprints found were on the rearview mirror.

Celeste White, a drug chemist with the Tennessee Bureau of Investigation (TBI), testified that she received four bags of white powder from the Knoxville Police Department. White understood that the bags had been recovered from the

suspect's car. White analyzed the substance and determined that the substance weighed 475.6 grams and contained cocaine.

Carl Smith, a forensic scientist with the TBI, analyzed powder that was obtained from the crime scene. According to Smith, the sample contained 312.6 grams of cocaine hydrochloride, which is commonly referred to as cocaine, and 82.4 grams of cocaine base, which is commonly referred to as crack cocaine. Smith testified that some of the bags he received to test contained powdered sugar.

John Casale, a research chemist with the Drug Enforcement Agency (DEA), examined the cocaine taken from the suspect car and from the crime scene. Casale testified, "I reached the conclusion that all fourteen bags were from the same batch of cocaine." Casale stated that the cocaine came from Peru and was ninety-eight percent pure.

Deputy Sheriff Russell Hatcher of the Blount County Sheriff's Department participated in a law enforcement "sweep" of the median strip of Alcoa Highway on October 19, 1998. Hatcher testified that during the sweep, he found a black, semi-automatic handgun with a magazine in it. Hatcher believed that the gun was loaded, but he was not sure. Captain Lowell H. Ridings, Jr., testified that the gun later found in the median of Alcoa Highway had five rounds in the magazine.

Joseph Huckleby, an investigator in the Criminal Investigations Division of the Knoxville Police Department, testified that on September 9, 1998, approximately one month before the crimes in this case, he was working patrol when he recognized a man who had pending warrants against him. The man was in a vehicle with two other men. Huckleby approached the vehicle, arrested the suspect, and performed a "security pat-down" on the other occupants of the vehicle. The Defendant was one of the occupants. Huckleby found a .45 Glock magazine containing ten rounds in the Defendant's front pants pocket. The Knoxville Police Department confiscated the magazine.

Harvey McGill testified that on October 16, 1998, he was driving home from work around 5:40 p.m. McGill testified that the traffic was heavy and that he was in a turn lane when he spotted what he thought was a toy pistol laying on the ground. McGill testified that he opened his car door, reached down, and picked up the gun. McGill then realized that he had found a nine-millimeter pistol with a magazine. McGill testified that it looked as though the gun had been run over a couple of times. McGill took the magazine out of the gun and noticed that the gun was loaded and ready to fire. McGill wrapped the gun in a tee-shirt and left. When McGill read about the shooting on Aluminum Avenue in the paper, he contacted the District Attorney General, who notified the Alcoa Police Department. The police retrieved the gun shortly thereafter.

Oakley McKinney, a forensic scientist with the TBI, analyzed the two pistols found in connection with this case. McKinney testified that he found no latent prints on one of the guns and no identifiable latent prints on the other. McKinney stated that the nine-millimeter pistol had debris on it.

Tom Heflin, a forensic scientist with the TBI, testified that he specializes in firearms identification. Heflin examined the two guns associated with this case. Heflin also examined the Glock magazine that was confiscated from the Defendant a month prior to the crime. Heflin testified that the magazine that was submitted with the Glock pistol and the magazine confiscated from the Defendant were basically the same. Heflin acknowledged that there was no indication that the Defendant's magazine had been in that particular gun. However, Heflin determined that three of the cartridges in each magazine were "produced in the same lot of ammunition, which means that they could have very well possibly have been boxed in the same box of ammunition." Heflin also testified that two of the fired cartridge casings found at the scene and the six cartridges in the two magazines confiscated from the Defendant "had been produced by the same bunter tool." Heflin noted that usually when Glock pistols like the one in this case are sold to the public, they are sold with two magazines, each with a ten-round capacity. Both of the magazines that Heflin examined had a ten-round capacity.

Kathleen Lundy, an examiner in the Federal Bureau of Investigation laboratory, testified that she specializes in "elemental analysis and comparison of bullet and shot pellet lead specimens." Lundy testified that she performed a "comparative bullet lead analysis" in this case. Lundy explained that "when you analyze two bullets, if you find the same chemical composition, the conclusion is that they are from the same batch or pour or melt of lead." In this case, Lundy compared two bullets retrieved from Garner's body, one bullet from the crime scene, a cartridge from the Glock pistol found in the median of the highway, four "test fires" from the Glock pistol, and the magazine that was confiscated from the Defendant. Lundy "found a total of three different compositions of lead represented by all the specimens analyzed." Lundy determined that the two bullets from Garner's body, the bullet from the crime scene, seven cartridges from the confiscated magazine, and five cartridges from the magazine in the Glock pistol had "analytically indistinguishable compositions."

Captain Daniel Neubert, Jr., of the Blount County Sheriff's Department testified that he is the Facility Administrator for the Corrections Division. According to Neubert, the Defendant had $38 and Whitman had no money when they were brought to the Blount County Jail on October 16, 1998.

Terrence Long testified that at the time of trial he was an inmate in the Blount County Jail, and had talked to the Defendant while the Defendant was incarcerated. Long recalled that someone asked the Defendant if he knew Sammy Garner. Long testified that the Defendant replied, "Oh, that punk-ass bitch." Regarding the last time the Defendant saw Garner, the Defendant stated, "Yeh, I remember that punk-ass bitch when I seen his brains splatter." Long testified that he and the Defendant were arguing when the Defendant made the statements about Garner. Long stated that he could not see the Defendant from his cell, but maintained that he knew that the Defendant made the statements because the person making the statements responded to the name "Asata." Long testified that he lived with Garner for ten years when his mother was married to Garner's father. Long stated that he had previously been to Stacey's Place and that he also knew Hill.

Dominic Rashad Kellogg testified that he was an inmate in the Blount County Jail at the time of the trial in this case. Kellogg testified that on October 16, 1998, he saw Garner at the home of a man named Jack. Kellogg stated that he noticed a gun in Garner's pocket and asked him what was going on. Garner said that he was going to sell a half of a kilogram of cocaine and left. Kellogg asked Garner to whom he planned to sell the cocaine, and Garner responded, "I don't know, I [have] never seen them before." Kellogg testified that Garner left Jack's house and walked toward a pavilion in the park.

Kellogg testified that he also knew the Defendant from the Blount County Jail. Kellogg recalled that he "cursed [the Defendant] almost everyday" regarding Hill and Garner. Kellogg testified that "[a]fter a couple of days, [the Defendant] finally said, 'I watched that bitch-ass nigger's brains splatter out of his head.'" According to Kellogg, the Defendant also said, "If Charles Hill wouldn't have never been there, this wouldn't have never happened." Kellogg further testified that the Defendant stated that because the Defendant shot Hill in 1995, "[the Defendant] figured that they would get him before he got them." Kellogg testified that although he shared a cell with Terrence Long, the arguments between the Defendant and Long occurred before Kellogg became incarcerated or moved into the cell with Long. Kellogg testified that he also knew Hill.

Detective Dale Boring of the Alcoa Police Department testified that he was a witness for the State in an aggravated assault case in which the Defendant was accused of shooting Charles "Bill" Hill. According to Boring, Hill testified at the preliminary hearing, and the Defendant was present in the courtroom during Hill's testimony. The trial was subsequently set for November 10, 1998, but the case was dismissed when Hill was killed. Boring testified that $3.48 was recovered from Hill's clothing and that $71.00 was recovered from Hill's vehicle.

B. Defense Proof

The Defendant testified that he graduated from high school and joined the Army, where he was a computer programmer from August 1992 until January 1995. At the time of the crime, the Defendant was attending Pellissippi State. The Defendant testified that he had known Whitman for about a year prior to the murders and that they saw each other once a week. The Defendant testified that he is five feet, five inches tall and that Whitman is approximately six feet, two inches tall. The Defendant stated that he introduced Whitman to Princeton Wells and that Whitman bought a .45 Glock pistol with a "laser beam" on it from Wells about five to eight months before the crime. The Defendant testified that Whitman carried the gun with him at all times.

The Defendant recalled that around noon on October 16, 1998, he was at Keathy Smith's house. The Defendant had gone to Smith's after leaving his girlfriend's house, which was located near Smith's house. The Defendant explained that his car had been impounded the previous night because the tags were expired. The Defendant testified that sometime between noon and one o'clock that afternoon, Whitman and Kenny Jamal Tory also arrived at Smith's house. The Defendant stated that Whitman drove Tory's car and took the Defendant to the impound lot to retrieve his car. After retrieving the car, both men returned to Smith's house. The Defendant testified, "When I first asked [Whitman] to go take me to go get my car at the impound [lot], [Whitman] asked me would I take him to Alcoa to see Sammy Garner."

The Defendant testified that they returned to Smith's house from the impound lot at approximately 2:00 p.m., but they did not leave for Alcoa until after 4:00 p.m. because Whitman had been "trying to page . . . Garner." Jamal Tory gave the Defendant and Whitman directions to get to Stacey's Place. According to the Defendant, Whitman asked to borrow Tory's 1998 four-door Oldsmobile because the motor in the Defendant's car began "ticking" on the way back from the impound lot. The Defendant testified that he drove because Whitman did not have a driver's license. The Defendant stated that Whitman told him that he was going "to talk about some musical equipment or to pick up some musical equipment or something like that."

The Defendant testified that on the way to Stacey's Place, he missed a turn and ended up at a Texaco gas station. The Defendant stated that he and Whitman attempted to call for directions, but the phone did not work so they drove down the street to a Food Lion grocery store to use the phone. The Defendant recalled that Whitman dialed Tory's number, but the Defendant talked to him. The Defendant testified that when they finally arrived at Stacey's Place, he pulled into the back part of the carport. Not finding anyone else there, the Defendant left the car engine running. The Defendant testified that Whitman got out of the car and told the

Defendant, "I'll be right back." However, a few minutes later, the Defendant saw a "little red car" drive up to Stacey's Place. According to the Defendant, Hill was driving the car, and Garner was in the passenger's seat. Hill parked the car beside the car that the Defendant was driving. The Defendant testified that it did not bother him that Hill was there and that he had met Garner a couple of times previously through Tory. The Defendant testified that Whitman and Tory were best friends, and he recalled that Tory had previously indicated that Garner was Tory's cousin.

The Defendant testified that after Hill and Garner arrived at Stacey's Place, he still did not turn the car engine off. The Defendant stated that he stayed in the car while Whitman, Hill and Garner all went inside Stacey's Place. The Defendant recalled that everyone appeared to be friendly with one another.

The Defendant testified that after everyone went inside, his pager went off, so he went inside to use the telephone. According to the Defendant, Garner handed Whitman a phone from behind the counter, and Whitman handed the phone to the Defendant. The Defendant explained that he went outside to make his phone call because he wanted some privacy. The Defendant stated that he planned to sit on the car to make the phone call, but he had to step out into the light to see the number on his pager. He stated, "[T]hat's when I heard the first two gunshots." The Defendant testified that the first two shots were more muffled than the following shots.

The Defendant recalled that he "immediately ran back towards the two parallel parked cars," but he "tripped and fell and the phone came out of [his] hand." The Defendant then noticed that the door to the club had been opened. The Defendant testified that he reached up to the car door and jumped into the back seat. According to the Defendant, he landed on a bullet-proof vest, put the vest on over his shirt, and "balled up" in the back seat of the car. The Defendant testified that Whitman jumped in the passenger seat of the car and asked the Defendant what he was doing. The Defendant stated that he asked Whitman what happened, and Whitman responded that "Dude shot him." The Defendant testified that Hill had braids in his hair and that Whitman told him that the man with braids shot Garner. The Defendant testified that Whitman, who had a gun when he got in the car, struck the Defendant in the head with the gun and said, "Nigger, you need to get me back to Knoxville . . . ." The Defendant stated that he then got in the front seat and drove.

The Defendant testified that Whitman told him that Hill and Garner were arguing and then Hill "just pulled out the gun and shot [Garner] and ran out [of] the club." The Defendant drove past Shaggy's Place, but stated that he did not remember seeing anything unusual. The Defendant testified that he stopped at the stop sign at Aluminum Avenue and put his shirt on over the bullet-proof vest. The Defendant reported that he told Whitman that he wanted to go back to get Garner. According

to the Defendant, Whitman asked him why and then said no. The Defendant stated that he then headed towards Alcoa Highway, but he "didn't have much to say to [Whitman]" because he was "way too upset." At this time, according to the Defendant, the gun was in Whitman's lap.

The Defendant testified, "[W]hen we passed by the police, [Whitman] took the gun and he put it . . . in his waist and he grabbed a bag that was on the floor in front of him by his feet . . . and jumped in the back seat with it." He stated, "I guess that had . . . to be when he stuffed the drugs in the back seat." The Defendant stated that Whitman did not tell him what was in the bag and that Whitman did not have the bag when he went into Stacey's Place. The Defendant testified that Whitman told him, "If the police get[] behind us . . . I'm going to shoot you if you pull over." The Defendant recalled that after a minute or two, Whitman crawled onto the front seat. The Defendant testified that he did not see the gun when Whitman crawled onto the front seat, but stated that there was a "bulge" in Whitman's clothing where the gun could have been.

The Defendant testified that after the traffic thinned, he saw a police car behind them, but he did not notice the lights or siren. The Defendant stated that he wanted to find a way to stop without crashing or getting shot, so he turned right onto Woodson Drive. The Defendant maintained that he allowed the police to catch up to his vehicle because he "didn't want to lose them." The Defendant testified, "[The police officer] rammed us . . . [a]nd then he shot at us and then he rammed us again right on through the stop sign. And then we crashed, we wrecked." When the car the Defendant was driving came to a stop, it had spun around and was facing the opposite direction.

The Defendant testified that the police car pulled up "door-to-door" with their vehicle, so the Defendant jumped over the back seat and climbed out of the passenger door. The Defendant observed the police officer slide across his seat and get out of his passenger side door. The Defendant testified that the officer "shot at [him]," so the Defendant "laid on the ground." The Defendant stated that the officer then "maced" him, slammed him into the back windshield, threw him on the ground, and handcuffed him. The police took the Defendant to the hospital and then to the Alcoa Police Department.

When asked if he knew about the cocaine, the Defendant replied, "No, not really. I knew [Whitman] put something . . . I knew he was doing something with a bag in the back seat, but as to what, I really couldn't say then." The Defendant maintained that he would not have gone to Alcoa if he had known about the drug transaction. The Defendant testified, "I don't mess with [drugs] and I don't sell them." He also testified that his mother was addicted to drugs and died at an early age. Finally, the Defendant testified that while in jail he had arguments with Terrence

Long and Dominic Rashad Kellogg and that they accused the Defendant of killing their friends.

Princeton Wells testified that he knew both the Defendant and Whitman. Wells stated that he sold a .45-caliber Glock pistol with two magazines to Whitman a couple of years before the trial. Wells testified that he had not met Whitman before he sold the gun to him and stated that the Defendant brought Whitman to Wells' house. Wells responded that he bought the gun, as well as a laser sight for the gun, at a gun show. Wells testified that he was a State's witness in a prior trial against the Defendant.

Scotty Anderson testified that he was an inmate in the Blount County Jail and recalled that he and the Defendant were housed in the same cell between March and June 1999. Anderson testified that he also knew Dominic Rashad Kellogg and Terrence Long. Anderson testified that he heard heated arguments between the Defendant, Kellogg, and Long. According to Anderson, Kellogg and Long were "talking crazy to [the Defendant]." Anderson testified that when Kellogg and Long accused the Defendant of killing Garner and Hill, the Defendant "just shook it off and said, you're crazy, you know, and just walked off." Anderson stated that he never heard the Defendant make any statements to Long or Kellogg indicating that he had any knowledge about the killings. Anderson admitted that he had a longstanding problem with drugs, alcohol, and sniffing paint.

Clinton Andrew Hacker testified that he was an inmate in the Blount County Jail, where he was housed in a cell with the Defendant for approximately one month. Hacker stated that he also knew Terrence Long and Dominic Rashad Kellogg. Hacker recalled that there was quite a bit of "bickering" between the Defendant and the other inmates. Hacker testified that they would "yell[] and scream[] at each other." Hacker testified that he never heard the Defendant talk about killing either of the victims.

Jason D. Love testified that he lives in Alcoa and was housed in the same jail cell with the Defendant during the summer of 1999. Love stated that he let the Defendant believe that he was from New York so that the Defendant would tell him about the incident. According to Love, the Defendant said that he went to Stacey's Place because "he was going to get something" from Garner, and then "he recognized somebody who he shot like a year or two ago." Love stated that the Defendant said he "knew something was funny because . . . both of them walked into the kitchen." According to Love, the Defendant said that he thought Hill and Garner were going to get the drugs, but that while the Defendant was inside Stacey's Place, "he heard something cock." Love testified that the Defendant "said he figured the guy recognized him when he walked in, so he had to get them first. He said when he walked out, he had to do what he had to do." Love acknowledged that the Defendant

never stated what he had to do. Love testified that the Defendant told him "not to say nothing."

Donnie Bridges testified that he was an inmate in the Blount County Jail with Love. He testified that he had an argument with Love because Bridges "associated with" the Defendant. According to Bridges, Love said that the Defendant had killed his friend.

Lowe, 2002 WL 31051631, at *1-14.

At the post-conviction proceedings, the following evidence[2] was presented: Edward P. Bailey, Jr., an assistant district attorney who prosecuted the Petitioner, testified that he could not recall how Kathleen Lundy became involved in the trial. He thought the Tennessee Bureau of Investigation ("TBI") forwarded evidence to the Federal Bureau of Investigation ("FBI") for further testing, and Lundy then became involved at the national level. Bailey stated that he did not meet Lundy until trial, when she responded to his subpoena, and he admitted he did not perform any independent investigation of her scientific procedures. Bailey explained that he called Lundy as a witness to link the bullets that were recovered at the crime scene, those found in the weapon that was recovered, and those found in a clip four weeks earlier.

Bailey further testified that he could not recall whether anyone but Brian Whitman was at the scene of the crime when police arrived. Further, he did not remember whether the police reported that Whitman was wearing shorts, whether the shorts were blood-stained, or whether the State ever came into possession of the shorts. Additionally, Bailey testified that Whitman did not have a deal with the State for his testimony; rather, his office decided not to make Whitman any specific offer but to take a "Norman Vincent Peale"[3] approach. If Whitman testified truthfully, he might "make friends" in the prosecutor's office. Bailey stated that he advised Whitman's attorney that, if Whitman testified truthfully, he would benefit. He stated, however, that he had never offered a flat, up-front sentence in exchange for testimony.

Bailey expounded on how Whitman came to testify against the Petitioner: Bailey and co-counsel found Whitman at a house based upon information provided by a Knoxville police officer.

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[2]Prior to hearing evidence, the post-conviction court determined, under *Holton v. State*, that it did not have the ability to consider the Petitioner's last amended petition for post-conviction relief because it was not signed. *See* 201 S.W.3d 626 (Tenn. 2006). As such, that amended petition was dismissed, and the post-conviction hearing proceeded under a previously filed and signed petition. The court further stated, "[T]he practical effect of not having the amended petition may be not very great" because the petitions were similar. The court added, "[W]hatever it is that [the Petitioner] wants to raise during the course of this hearing, confer with [post-conviction counsel] and raise it."

The trial court additionally denied the Petitioner's motion to receive funds to pay for expert testimony concerning ballistics.

[3]Norman Vincent Peale was a best-selling author who wrote about the power of positive thinking as well as how to win friends and influence people.

Whitman agreed to talk with them, and they proceeded to a Shoney's Restaurant to hear his version of the events. Bailey did not make an offer to Whitman for his testimony, and he did not recall ever discussing Whitman's shorts.

Bailey next discussed another witness against the Petitioner, Myron Kellogg. Kellogg was a voluntary witness who came forward with information about a drug transaction relevant to this case. Bailey testified that he did not promise Kellogg anything for his testimony.

Mike Hickman, Brian Whitman's counsel, testified that he was appointed to represent Whitman after Whitman was charged with two counts of facilitation of first-degree murder just before the Petitioner's trial. At that point, Hickman discovered that Whitman had discussed this case with the prosecutors some time before, and then disappeared. He only reappeared after he was charged with facilitation of first-degree murder. Hickman met with Whitman prior to Whitman's testimony at the Petitioner's trial, when Hickman explained that testifying truthfully would be in Whitman's best interest. Specifically, Hickman wanted to "make sure that [Whitman] did what was right, which was tell the truth about what happened because he was not going to . . . get in any greater trouble than he was already in over it and that once all this was over and the dust settled, he would be rewarded so to speak . . . ." Hickman stated that the State did not offer any plea deal for Whitman's testimony. Hickman was then asked, "[A]t any point, to your knowledge, was the arrangement that you have described related to either [The Petitioner] or his trial counsel?" Hickman responded:

> I had talked with [Counsel]. I would like - - if he has memory better than mine, I would like to hear his thoughts on it. But I'm pretty sure that I relayed to him that this was strange and odd, but this is the circumstance that I'm finding myself in. And [Counsel] was in the middle of the trial and very busy and what not and I think he took the time to tell me, well, you've just got to do what you've got to do. If your client testifies, he does.

Kirk Andrews, the other Assistant District Attorney who prosecuted the Petitioner, testified she did not recall any specifics about Lundy or her testimony. Andrews also did not recall meeting Whitman at Shoney's Restaurant. Andrews recalled meeting Kellogg but denied offering him a plea deal in exchange for his testimony. Andrews summed up her recollection of the Petitioner's trial: the State had a strong case because there "was forensics proof regarding the weapon," and they found cocaine in the car the Petitioner was driving. They procured a ballistics expert who linked a gun with bullets found at the crime scene, and Andrews explained, "it was one of the pieces of evidence." Additionally, the Petitioner was caught after the crime wearing a bulletproof vest. Andrews could not remember why the State decided to focus its investigation on the Petitioner instead of Whitman, and she could not recall any bloody shorts that Whitman may have been wearing at the time of the crime.

Counsel testified that some of the strongest evidence linking the Petitioner to the crime was Lundy's expert testimony connecting bullets found in the victims, with a gun found on the side of

the road, and with a clip taken from the Petitioner four weeks before the killings. Counsel researched the issue but found there were no civilian experts in the field because the FBI was merely theorizing the science at that point. Since the Petitioner's trial, the theory has been disavowed by the FBI, and Counsel learned of cases in other jurisdictions that were reversed on this issue. In addressing his knowledge of any potential "deal," Counsel specifically stated that he was never advised the State took a "Norman Vincent Peale" approach to Whitman. Had he known that approach had been taken, he would have used that information during his cross-examination of Whitman.

Counsel explained that the Petitioner maintained from the beginning that he was merely a victim of circumstance, and Whitman was the shooter. Counsel recalled a fall-back position of self-defense developed during trial. In making a judgment call, Counsel asked the jury to be instructed on self-defense, despite the Petitioner's protestations of outright innocence. Counsel could not recall if the Petitioner complained about the self-defense instruction. With regard to the bloody shorts Whitman was allegedly wearing, Counsel stated he did not request they be tested because he feared the tests would be inculpatory for his client. Counsel determined the best course of action was to claim the police rushed to judgment and failed to properly investigate. Additionally, Counsel attempted to locate Jamal Tory, who owned the bulletproof vest, but neither Counsel nor the State could find him. Counsel claimed the picture of the Petitioner wearing the bulletproof vest "unlatched" seemed to fit with his story. Counsel also testified that he unsuccessfully attempted to recover the gun that the Petitioner allegedly pointed at the officer and then threw out the window somewhere along the highway. Further, he noted that the police recovered no physical evidence, fingerprints, or blood linking the Defendant to the inside of the structure where the shooting took place.

Counsel further testified that he began researching Lundy within two years after the Petitioner's trial. He learned that Lundy had been convicted of perjury and a number of cases were overturned based on her testimony.[4] Counsel explained that, as stated in *Ragland*, an FBI metallurgist debunked the theory Lundy used during the Petitioner's trial. However, at the time of trial, Counsel researched the issue, and he found no expert who would testify that this was "junk science." Counsel also stated that he challenged the search and seizure of the clip, but he could not recall whether he challenged it specifically on constitutional grounds.

On cross-examination, Counsel admitted that the State's other expert witness was also important. That witness testified "he could not tell any difference" between the clip taken from the Petitioner prior to the shooting and the one in the murder weapon. Additionally, the bullets found

[4] *See Ragland v. Kentucky*, 191 S.W.3d 569 (Ky. 2006); *Clemons v. Maryland*, 896 A.2d 1059 (Md. Ct. App. 2006); *New Jersey v. Behn*, 868 A.2d 329 (N.J. Super. Ct. App. Div. 2005). Lundy has also been found guilty of false swearing in Kentucky, a class B misdemeanor. *Ragland,* 191 S.W.3d at 581.

in the clip had similar "bunt"[5] marks as those found at the scene and in the murder weapon. In hindsight, Counsel stated that he wished he had done more research on Lundy, and he learned post-trial she had been "defrocked" in Minnesota in 1999 and was precluded from testifying there.

On redirect-examination, Counsel stated that his case attempted to sidestep the experts who testified about the bullet similarities. The Petitioner's case was based on the theory that the gun found was not his gun, but Whitman's.

Brian Whitman testified that he discussed the details of the shooting with the prosecutors at his house and then at Shoney's Restaurant. Whitman stated that, when he and the Petitioner were first caught, he was wearing bloody shorts, and the State never confiscated them even after Whitman offered the shorts a number of times. Whitman said he believed he would receive a reduced sentence in exchange for his testimony against the Petitioner, and he claimed his attorney orchestrated the arrangement. Whitman testified that he did not recall being questioned about whether he received any benefit for his testimony. He also stated that he could think of no particular reason that the Petitioner was charged with this crime as opposed to him being charged.

On cross-examination, Whitman testified that he met with the prosecutors at Shoney's Restaurant prior to trial. At that point, Bailey and Andrews had not offered favorable treatment for his testimony. Whitman stated the substance of his discussion at Shoney's Restaurant was the same story he told law enforcement the day of his initial arrest. Whitman stated that, at the time he testified, he had not received a definitive promise by the State with respect to a reduced sentence. On redirect examination, Whitman stated that he was never told he would receive compensation if he testified.

The Petitioner testified that he believed the inmates in his jail cell were agents for the State, and they attempted to induce a confession from him. The Petitioner also stated that he believed Whitman and Kellogg made deals with the State to testify, and these deals were not disclosed to him. Additionally, Counsel failed to obtain Whitman's bloody shorts, which he believed would have exonerated him. Counsel further requested a self-defense jury instruction over the Petitioner's objection. The Petitioner believed independent testing of the two clips found would have established his actual innocence. Counsel failed to test the bulletproof vest and failed to inquire into a nine millimeter gun that was introduced but not linked to the crime. The Petitioner also faulted Counsel for not finding Jamal Tory, who he claimed would have testified in his favor about the bulletproof vest. Furthermore, he wished Counsel would have called Keithy Smith, who he claimed would have testified that the Petitioner was not wearing the bulletproof vest when he left to go to Stacey's Place.

[5] "Bunt" marks occur when shell casings are manufactured. The manufacturer uses a tool to make a mark on the casings, in this case, "WW .45 auto." A microscopic analysis can reveal whether the same "bunting" tool was used, thereby indicating if the casings were produced at about the same time. The marks will be similar for, roughly, 150,000 casings.

The Petitioner claimed that he first met with Counsel over a year after he was charged. When they finally met, the Petitioner maintained his innocence. He was not concerned about tests because they would all show he was innocent. The Petitioner questioned why Counsel was not the first person to raise questions about the ballistics expert testimony. Additionally, the Petitioner complained that the initial search of his person that turned up the clip was an unconstitutional search. Finally, the Petitioner stated that all the alleged errors, in addition to the ones found harmless by this Court on appeal, resulted in substantial cumulative error.

On cross-examination, the Petitioner admitted that he only found out about Lundy from Counsel after his direct appeal. The Petitioner admitted that he had no evidence to substantiate his claim that the jailhouse witnesses were the State's agents. Additionally, he had no further evidence so support his claim that Kellogg and Whitman had been granted deals by the State. The Petitioner stated he has repeatedly requested that post-conviction counsel obtain the bloody shorts, but they have not been obtained or tested. The Petitioner acknowledged that Counsel requested *Jenks* material, and no tests have been made on the bulletproof vest or the "bunting" evidence. The Petitioner stated he asked post-conviction counsel to find Tory, who he claimed was in a federal penitentiary. The Petitioner admitted that the trial court addressed the exclusion of the clip in a jury-out hearing, and, at that hearing, the officer testified he arrested another individual in the car and found a firearm under a seat.

On redirect-examination, the Petitioner testified that he understood Tory and Smith could not be found, and no private investigator was hired at the post-conviction stage because this was not a capital case.

On rebuttal, Counsel testified again and affirmed that the Petitioner did not explain his version of the story and give the substance of his testimony until just prior to trial. Counsel stated that he had some idea of the substance of the Petitioner's testimony through discussions from his appointment to trial, but he does not question his clients on whether they committed the offense. On cross-examination, Counsel examined his fee schedule and stated that he continuously met with the Petitioner and kept him updated, contrary to what the Petitioner testified. Counsel additionally stated he was never told about a witness named Smith, but he attempted to locate Tory to no avail. Counsel did not hire a private investigator to search for Tory.

Upon hearing this evidence, the post-conviction court determined there was no evidence to support the Petitioner's allegations that the State negotiated a deal with any witnesses and then failed to notify the Petitioner. The court did, however, find that Whitman was wearing bloody shorts, but Counsel was unaware of these shorts. The court found the State failed to secure and disclose the evidence, but this error was ultimately harmless because of the overwhelming evidence against the Petitioner and because of Whitman's proximity to the victims at the shooting. Additionally, the trial court determined Lundy's unreliable testimony could have been discovered by due diligence. Again, however, the trial court found this to be harmless because another witness, Heflin, also linked the Petitioner to the gun and the bullets. The trial court declined to grant relief on these issues.

With respect to the ineffective assistance of counsel claim, the trial court determined the Petitioner failed to show any rebuttal evidence existed at the time of trial for Counsel to discover, and therefore the issue was without merit. Concerning the self-defense instruction, the trial court found the instruction did not prejudice the Petitioner because the Petitioner's testimony "was at odds with all the proof." Finally, the court found the Petitioner failed to prove to what Tory would testify, and, even assuming Tory would testify in accordance with what the Petitioner claimed, Tory's testimony would not have changed the outcome of trial. Therefore, the trial court denied post-conviction relief.

II. Analysis

On appeal, the Petitioner raises the following issues as bases for post-conviction relief: (1) the post-conviction court improperly refused to allow the Petitioner to amend his petition; (2) the post-conviction court violated the Petitioner's due process rights by refusing to appoint an expert or provide a hearing on the need for investigative services; (3) the Petitioner is entitled to post-conviction relief due to newly discovered evidence; (4) the post-conviction court erred in finding harmless the State's failure to secure and disclose evidence favorable to the Petitioner; (5) the Petitioner did not receive the effective assistance of counsel; and (6) the cumulative effect of the errors deprived the Petitioner of due process.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

A. Amended Petition

As an initial matter, the Petitioner asserts that the trial court failed to allow him additional time to amend his petition subsequent to the release of *Holton v. State*, 201 S.W.3d 626 (Tenn.

2006).[6] The Supreme Court of Tennessee, in *Holton*, held that a post-conviction petition that was neither signed nor verified under oath by the Petitioner prevented the post-conviction court from exercising jurisdiction. *Id.* at 635. In this case, the Petitioner filed a post-conviction petition, which was subsequently amended by counsel. That amended petition was neither signed nor verified by the Petitioner. The trial court concluded that it could operate under the original petition that was properly signed and verified, but it declined to allow the Petitioner leave to re-file a signed and verified amended petition; however, the court stated that it would allow the Petitioner to raise any issues he wished. The practical effect of this decision was to prevent further delay and allow a full hearing on the issues.

The post-conviction statutes clearly contemplate amended petitions, *see* T.C.A. §§ 40-30-104(g), -106(d), -107(b)(2) (2006); *see also* Tenn. Sup. Ct. R. 28 § 6(b), but the statutes omit a standard for ruling on motions requesting leave to amend. Prior versions of the post-conviction statutes contained such a standard. Tennessee Code Annotated section 40-30-115(a) (1990) (repealed) stated, "The court . . . may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief." *See Wade v. State*, 914 S.W.2d 97, 104 (Tenn. Crim. App. 1995). In our view, the trial court was not in error in denying the motion requesting leave to file an amended petition because substantial justice did not so require. The original petition set out almost the exact same issues, and the trial court allowed the Petitioner to raise any additional issues at the hearing. Additionally, the trial court sought to avoid prolonging the case, in part, because three years had passed since the filing of the original post-conviction petition. The Petitioner is not entitled to relief on this issue.

B. Post-Conviction Expert

The Petitioner next contends that the trial court erred when it refused to appoint an expert at the post-conviction stage. The trial court noted that the Tennessee Supreme Court Rules clearly prohibit the authorization of expert services in non-capital post-conviction proceedings. Tenn. Sup. Ct. R. 13 § 5(a)(2); *see* T.C.A. § 40-17-207 (2007); *Davis v. State*, 912 S.W.2d 689, 696-97 (Tenn. 1995). The Petitioner asserts that due process requires such an expert in his case.

This issue revolves around Lundy's testimony that the bullets discovered at the crime scene matched the bullets in the two clips – one found on the Petitioner's person four weeks before the shooting, the other found in the median of a highway down which the Petitioner attempted to flee from the police. At the time of trial, the FBI was in the process of concluding that Lundy's scientific analysis was faulty. Since the Petitioner's conviction, at least three cases have been reversed in sister jurisdictions where Lundy testified to this very issue.

[6] *Holton* was decided on May 4, 2006, and an amended opinion was issued on June 22, 2006. This post-conviction hearing took place June 27-28, 2006.

In *New Jersey v. Behn*, the New Jersey Superior Court, confronted with Lundy's testimony, granted post-conviction relief on the basis that the "erroneous scientific foundations and its admission met the requirements for granting a new trial on the ground of newly discovered evidence." 868 A.2d 329, 331 (N.J. Super. Ct. App. Div. 2005). In *Ragland v Kentucky*, the Kentucky Supreme Court granted a new trial on direct appeal because the trial court erred in admitting Lundy's expert testimony on comparative bullet lead analysis ("CBLA"). 191 S.W.3d 569, 573 (Ky. 2006). Similarly, in *Clemons v. Maryland*, the Court of Appeals of Maryland reversed a conviction after determining that Lundy's CBLA analysis did not meet the standards for scientific expert testimony. 896 A.2d 1059, 1061-62 (Md. Ct. App. 2006).

The post-conviction court determined that any error in admitting Lundy's testimony was ultimately harmless because Heflin essentially testified to the same thing. Specifically, Heflin testified that markings on the shell casings were such that the shell casings found at the scene of the crime could be matched to those in the two clips. Heflin and Lundy reached the same ultimate conclusion, albeit through different analyzes.

The Petitioner claims that due process requires he receive funding to hire an expert to refute Heflin, thereby making the Lundy error harmful. In our view, for us to even analyze this due process claim, the Petitioner was required at a minimum to make a threshold showing that such an expert exists. This showing would demonstrate that the claim that an expert could have testified to rebut Heflin was more than mere speculation. We cannot conclude that the Due Process Clause was violated based on mere conjecture. The Petitioner is not entitled to relief on this issue.

C. Newly Discovered Evidence

The Petitioner next contends that he is entitled to a new trial based on newly discovered evidence, *to wit*, the faulty science of the CBLA. The post-conviction court agreed that allowing Lundy's testimony was error, but it was ultimately harmless because Heflin's testimony "was of the same practical effect as Lundy's" and, therefore, "did not alter the outcome of the trial to the [P]etitioner's detriment."

The State asserts that the Petitioner is not entitled to post-conviction relief because this is more appropriately a writ of error coram nobis. *See* T.C.A. § 40-26-105 (2006). The statute provides:

> (a) There is made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith. Notice of the suing out of the writ shall be served on the district attorney general. No judge shall have authority to order the writ to operate as a supersedeas. The court shall have authority to order the person having custody of the petitioner to produce the petitioner in court for the hearing of the proceeding.

> (b) The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.
>
> (c) The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

T.C.A. § 40-26-105(a)-(c). The Tennessee Supreme Court recently interpreted the standard for granting relief under this statute:

> [W]e hold that in a coram nobis proceeding, the trial judge must first consider the newly discovered evidence and be "reasonably well satisfied" with its veracity. If the defendant is "without fault" in the sense that the exercise of reasonable diligence would not have led to a timely discovery of the new information, the trial judge must then consider both the evidence at trial and that offered at the coram nobis proceeding in order to determine whether the new evidence may have led to a different result.

State v. Vasquez, 221 S.W.3d 514, 528 (Tenn. 2007).

As the State correctly notes, the Petitioner is requesting post-conviction relief, not a writ of error coram nobis. Thus, the first question is whether we may treat the petition for post-conviction relief as a petition for a writ of error coram nobis. In *Harris v. State*, the Tennessee Supreme Court addressed whether a petition to reopen a post-conviction petition could be, sua sponte, converted to a petition for a writ of error coram nobis. 102 S.W.3d 587, 588 (Tenn. 2003). In *Harris*, the petitioner asserted that he should be allowed to reopen a post-conviction proceeding because the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). 102 S.W.3d at 588. The Tennessee Supreme Court concluded that this Court erred in treating the motion to reopen as a petition for a writ of error coram nobis because the two proceedings are fundamentally distinct. *Id.* at 591-92. The two have separate governing procedural rules and grounds for relief, and a motion to reopen "contemplates a summary proceeding in which the trial court can readily determine whether or not one of the three very narrow grounds for reopening exists." *Id.* at 592. The Court further noted that the reopening grounds "can and likely will be proven by documentary evidence alone . . . ." *Id*. Additionally, because the State may choose not to respond to a motion to reopen, "[t]he record on appeal therefore is minimal . . . ." *Id*. Ultimately, the Court held:

The distinctions between motion to reopen and coram nobis proceedings illustrate why it will rarely, if ever, be appropriate for an appellate court to sua sponte treat a motion to reopen as a petition for writ of error coram nobis. In doing so, the appellate court will deprive the State of an opportunity to file an appropriate response in an error coram nobis proceeding, and the trial court, which is accustomed to resolving the factual disputes likely to arise, will be deprived of the opportunity to determine the merits of the petition in light of the State's response. In sua sponte treating the motion to reopen as a petition for writ of error coram nobis, the Court of Criminal Appeals in this case apparently failed to consider the fundamental distinctions between these proceedings. The intermediate appellate court's reliance upon *Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn.1995), as authority for its action was misplaced. In considering whether a trial court had the authority to treat a habeas corpus petition as a petition for writ of certiorari, this Court in *Norton* stated:

> It is well settled that a trial court is not bound by the title of the pleading, but has the discretion to treat the pleading according to the relief sought. *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338, 342 (Tenn.1983); *State v. Minimum Salary Dep't. of A.M.E. Church*, 477 S.W.2d 11, 12 (Tenn.1972).

Id. at 319 []. The decision in *Norton* recognizes the authority of trial courts to treat a pleading in accordance with the relief sought. However, the decision in *Norton* does not support the notion that appellate courts may independently examine motions to reopen to determine whether the petitioner should have pursued a completely different avenue of relief in the trial court. Appellate review generally is limited to the issues raised and decided in the trial court. *See, e.g.*, Tenn. R. App. P. 13 & 36. Adherence to this principle is particularly important in the context of motions to reopen given the limited, summary, and expedited nature of such proceedings. Indeed, were appellate courts to routinely evaluate such motions and address grounds never litigated nor decided in the trial court, the summary nature of such proceedings would be irrevocably altered. Therefore, we conclude that the Court of Criminal Appeals erred in sua sponte treating the motion to reopen as a petition for writ of error coram nobis.

Id. at 593-94.

Further, Tennessee Code Annotated section 40-30-105(c) allows petitions for habeas corpus relief to be treated as petitions for post-conviction relief when "relief . . . appear[s] adequate and appropriate." However, *Moran v. State* observes that "there is no provision that a petition for post conviction may be treated as one for habeas corpus." 457 S.W.2d 886, 887 (Tenn. Crim. App. 1970). We likewise observe that there is no provision allowing a petition for post-conviction relief to be treated as one for error coram nobis. Although there are certainly differences between original

petitions for post-conviction relief and motions to reopen post-conviction proceedings, the *Harris* opinion and the lack of any provision in the statute allowing such a conversion leads this Court to conclude that we may not treat a petition for post-conviction relief as one requesting relief under the writ of error coram nobis. The Petitioner is not entitled to relief on this issue.

D. Failure to Secure and Disclose Evidence

1. Bloody Shorts

The Petitioner next argues that the State failed to secure and disclose a pair of bloody shorts that Whitman was wearing when he was pulled from the "getaway" car. The post-conviction court found Counsel was unaware of the existence of the shorts until Whitman testified to their existence, and it found the State failed to secure and disclose the evidence but that error was harmless. In our view, there are two critical "pieces" of evidence in issue: the tangible bloody shorts and the State's knowledge of the existence of the bloody shorts.

The first question we must analyze is what law applies to this situation. The Petitioner directs our attention to *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Crim. App. 1993), for the proposition that the State had the affirmative duty to seek out the shorts, seize them, and disclose the seizure. Based on our review of *Spurlock*, we cannot completely agree with the Petitioner. In *Spurlock*, this Court concluded that the State had a duty to disclose statements given that indicated another individual committed the crime for which Spurlock was tried and convicted. *Id*. at 604. The State possessed the statements in question; thus, the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), was violated. *Spurlock*, 874 S.W.2d at 604, 609-10. Central to the Petitioner's argument in this case is *Spurlock's* citation to the ethical rules applicable to prosecutors. *Id*. at 611. Primarily, we focus on the following ethical consideration as cited in *Spurlock*:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict . . . . With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. *Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.* (Emphasis added.)

Id. (quoting Tennessee Code of Professional Responsibility EC 7-13 (prosecutorial disclosure requirements currently embodied in Tenn. Sup. Ct. R. 8, 3.8(d) (2007)). The Tennessee Supreme Court, in *State v. Superior Oil, Inc.*, stated that "it has long been recognized that the office has the inherent responsibility and duty to seek justice rather than to be just an advocate for the State's victory at any cost." 875 S.W.2d 658, 661 (Tenn. 1994).

The United States Supreme Court has discussed the role of the prosecuting attorney in the following manner:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

Although we recognize the ethical considerations at play here, we cannot conclude that a prosecutor's ethical requirement grants a substantive right in this case. Thus, *Spurlock* and the ethical considerations are not a basis for relief as to the shorts themselves.

The State argues that *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), applies to the case at bar. In that case, the Tennessee Supreme Court addressed the question, "What are the factors which should guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory?" *Id*. at 914. The Court determined the critical inquiry was, "Whether a trial, conducted without the destroyed evidence, would be fundamentally fair?" *Id*. In *Ferguson*, the Court addressed a fact situation where the Defendant was convicted of driving while intoxicated, and a tape of sobriety tests, conducted after the initial field tests were completed, was inadvertently taped over. *Id*. at 914-15. The Court noted that its inquiry was distinct from that under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *United States v. Agurs*, 427 U.S. 97, 110-11 (1976), because those two cases address "plainly exculpatory" evidence, while *Ferguson* addressed a situation "wherein the existence of the destroyed videotape was known to the defense but where its true nature (exculpatory, inculpatory, or neutral) can never be determined." *Id*. at 915.

The *Ferguson* Court went on to explain that the first step in the analysis is determining whether the State had a duty to "preserve" the evidence. *Id*. at 917. This duty to preserve seems to imply that the State needs to possess the evidence or have constructive possession of the evidence. It is undisputed that the State did not actually possess the evidence in this case. Constructive possession requires intent to possess, which the State also did not appear to have. *See United States v. Craig*, 522 F.2d 29, 32 (6th Cir. 1975) ("Constructive possession requires that a person knowingly have the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.") (quotations omitted). Thus, *Ferguson* does not apply to the shorts themselves.

We turn to the State's knowledge of the existence of the shorts. The trial court specifically determined that the State knew of the existence of the shorts. Had the State shared this information with the Defendant prior to trial, the information that Whitman was wearing bloody shorts when he was pulled from the "getaway" car could have been used to cross-examine Whitman. Specifically, the information that Whitman's shorts were bloody may well have caused the jury to question Whitman's testimony that he did not shoot either victim. Whitman was the State's sole "eyewitness." The information that Whtiman's shorts were bloody, thus, might fall under *Brady*. *See United States v. Giglio*, 405 U.S. 150, 153 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady*] rule.") (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). As the Supreme Court further stated, howver, "A finding of materiality of the evidence is required under *Brady* . . . ." *Giglio*, 405 U.S. at 153 (quotations and citations omitted).

We cannot conclude that the knowledge of the bloody shorts worn by Whitman when he was pulled from the getaway car is material because it is unclear whose blood was on the shorts. Post-conviction counsel failed to question Whitman as to this crucial fact, and we cannot make a materiality determination without this information. At trial, evidence was presented that broken glass, resulting from gunshots fired at and from the getaway car, was found at the scene of the apprehension of Whitman and the Petitioner. It is certainly plausible to think that Whitman, when confronted with the bloody shorts, would have simply stated that he was cut when exiting the getaway car, and he bled on his shorts. Assuming this was the response, this line of questioning would certainly not be material to the Petitioner's defense. Although we can also speculate to a response that would have been material, such as Whitman breaking down and confessing when confronted with knowledge of the bloody shorts, speculation is insufficient to grant post-conviction relief. Thus, in our view, no *Brady* violation occurred because the Petitioner has not proven that the knowledge of the shorts were material to his defense.

2. Favorable Deal/Cross-Examination

The Petitioner also contends that the State failed to disclose that it had reached a deal with Whitman prior to his testimony, information that could have been used on cross-examination. The prosecutors did testify that they used the "Norman Vincent Peale" approach, essentially telling Whitman that if he testified truthfully, he could make "friends" at the District Attorney's office.

The Petitioner again relies on *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Crim. App. 1993), in arguing the deal or favorable treatment should have been disclosed. In *Spurlock*, we said:

> It is a fundamental principle of law that an accused has the right to cross-examine prosecution witnesses to impeach the credibility or establish the motive or prejudice of the witness. This includes the right to cross-examine a prosecution witness regarding any promises of leniency, promises to help the witness, or any other favorable treatment offered to the witness.

Id. at 617; *accord State v. Rice*, 184 S.W.3d 646, 670 (Tenn. 2006) ("A defendant's right to examine a witness to impeach his or her credibility or to establish that the witness is biased includes the right to examine a witness regarding any promises of leniency, promises to help the witness, *or any other favorable treatment offered to the witness*." (Emphasis added.)) (citing *State v. Sayles*, 49 S.W.3d 245, 279 (Tenn. 2001) (citing *State v. Smith*, 893 S.W.2d 908, 924 (Tenn. 1994))).

As the trial court found, there is simply no evidence to support the Petitioner's assertion that the State reached a deal with Whitman. Whitman, Whitman's attorney, and two prosecutors all testified to essentially the same thing: the "Norman Vincent Peale" approach. Thus, the question before us is whether the "Norman Vincent Peale" approach constitutes "favorable treatment offered to the witness."

Again, Whitman's counsel described the arrangement in the following terms,"[I wanted to] make sure that [Whitman] did what was right, which was tell the truth about what happened because he was not going to . . . get in any greater trouble than he was already in over it and that once all this was over and the dust settled, he would be rewarded so to speak, like Mr. Bailey said, with some type of plea agreement perhaps that wouldn't go so hard on him." Bailey described the arrangement as follows:

> Now, as far as any deal, my recollection is that I expressed to Mr. Whitman that now was the time for the Norman Vincent Peale approach, that we were not going to make Whitman any kind of specific offer, but that he was certainly in a position that he needed to make friends and influence people, and that by doing that he could testify and testify to the truth of what he actually knew. And that if he did that, then he would certainly have more friends on the prosecution side than he would if he lied or if he declined to testify.

In our view, this arrangement does not constitute "favorable treatment offered to the witness." *Rice*, 184 S.W.3d at 670. The Norman Vincent Peale approach is simply too vague to be an "offer" of favorable treatment. The State need not have disclosed the approach taken with Whitman. Thus, the Petitioner is not entitled to relief on this issue.

E. Ineffective Assistance of Counsel

The Petitioner next claims that he did not receive the effective assistance of counsel. He specifically alleges that Counsel inappropriately requested a self-defense instruction; failed to procure an independent test of the bullets and bulletproof vest that linked him to the crime; failed to rebut the testimony of Agent Heflin; failed to obtain and test the bloody shorts; and failed to locate and present Jamal Tory, a witness for the Petitioner.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution.

State v. White, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

1. Self-Defense Instruction

First, the Petitioner complains that Counsel failed to follow his wishes when Counsel requested the trial court instruct the jury on self-defense. The Petitioner testified that he maintained his innocence throughout the trial, and he instructed Counsel not to request a self-defense instruction because it was at odds with his claim of outright innocence. Counsel testified that he could not recall if he and the Petitioner discussed the self-defense instruction as it was "developed during trial." Counsel testified he made the tactical decision to give the jury an alternate option consistent with some of the evidence.

In our view, Counsel's decision to request an alternate instruction was an informed tactical decision. *See House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). The Petitioner is not entitled to relief on this issue.

2. Expert Testing and Rebuttal Expert Testimony

The Petitioner next argues that Counsel failed to independently test the bullets, failed to test the bulletproof vest, failed to test the bloody shorts, and failed to call witnesses to offer rebuttal testimony to the testimony of Heflin concerning bunter tool marks on the shell casings. We now know that Lundy's CBLA testing procedures have been disavowed, but, at the time of trial, this was not known; this is clear from the record. When a claim of ineffective assistance of counsel is predicated upon a failure to investigate, the petitioner is obligated to show what a reasonable investigation would have revealed. *Owens v. State*, 13 S.W.3d 745, 756 (Tenn. Crim. App. 1999). The Petitioner has not presented evidence that Counsel could have, at the time of trial, secured independent testing of the bullets. Testimony revealed that the FBI was the only organization or lab conducting such a test at that time. However, even if Counsel should have discovered the problems with Lundy, we, like the trial court, conclude that the Petitioner was not prejudiced. Unlike the cases from our sister jurisdictions, the State presented two experts that both tied the Petitioner to the bullets. Had the State presented only Lundy, we might be more inclined to grant relief, but that is not the case before us.

Next, the Petitioner argues Counsel should have tested the bulletproof vest. The Petitioner has failed to prove what testing of the bulletproof vest would have accomplished. *Id.*

With respect to Counsel's failure to rebut Heflin's testimony, the Petitioner did not present any evidence at the post-conviction hearing to support this claim. *Id*. We recognize that the Petitioner would claim it is difficult to present expert testimony at the post-conviction hearing to rebut Heflin because indigent defendants are not entitled to expert witnesses at the post-conviction stage in non-capital cases. Tenn. Sup. Ct. R. 13 § 5(a)(2); *see* T.C.A. § 40-17-207 (2007); *Davis v. State*, 912 S.W.2d 689, 696-97 (Tenn. 1995); *see also, supra,* section II(B). In our view, the rule is clear that the Petitioner is not entitled to funds for expert witnesses in non-capital post-conviction cases. Again, we are not in a position to address the Petitioner's claim for funding without a threshold showing that some evidence or an expert exists to support the Petitioner's argument. The trial court correctly applied the law and did not err in denying the post-conviction relief on this issue.

Finally, with respect to the bloody shorts, the Petitioner has not proven that he suffered prejudice as a result of the shorts not being tested. Counsel's explanation of why he chose not to request the shorts be tested certainly leaves something to be desired, especially considering Counsel would not have necessarily been required to reveal whose blood was on the shorts. *See* Tenn. R. Crim. P. 16(b)(1) (explaining the evidence would only need to be disclosed if the Petitioner wished to introduce the evidence during his case-in-chief). The Petitioner is required, however, to show he was prejudiced by failure of Counsel to have the shorts tested. We still do not know whose blood was on the shorts, thus we cannot speculate as to what effect at trial the bloody shorts evidence might have had. We recognize that this is difficult for the Petitioner, as the Petitioner is not given funds to test the shorts at the post-conviction stage. The Petitioner, however, could have questioned Whitman at the post-conviction hearing as to whose blood was on the shorts. We are not convinced that the Petitioner has proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Petitioner is not entitled to relief on this issue.

3. Jamal Tory

Finally, the Petitioner complains that Counsel failed to discover Jamal Tory's whereabouts and subpoena him to testify regarding the bulletproof vest. At the post-conviction stage, post-conviction counsel stated on the record that he unsuccessfully attempted to locate Tory. The Petitioner claimed Tory was in a federal penitentiary, but post-conviction counsel stated he was not to be found in a federal prisoner database. The Petitioner's failure to present Tory precludes relief. He is not entitled to relief on this issue.

F. Cumulative Error

Lastly, the Petitioner argues that, even if some of the errors were determined to be harmless, the cumulative effect of those errors deprived him of his right to due process. Two errors were found on direct appeal: the trial court erred in admitting evidence in violation of Tennessee Rule of Evidence 404 that the Petitioner was facing an aggravated assault charge against one of the victims

at the time of the murder; and the trial court failed to correctly charge lesser-included offenses. Additionally, Lundy's testimony, in hindsight, should have not been presented to the jury. We, like the post-conviction court, conclude that the evidence of the Petitioner's guilt was overwhelming, and the cumulative effect of the errors is still harmless. The Petitioner was not deprived of his right to a fair trial.

III. Conclusion

Upon review, we conclude that the post-conviction court did not err in denying the Petitioner post-conviction relief.

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ROBERT W. WEDEMEYER, JUDGE